STATE OF ALASKA

IBLA 89-128, 89-129, Decided October 24, 1990

Appeals from decisions of the Alaska State Office, Bureau of Land Management, finding Native allotment applications A-062907 and A-062882 to have been legislatively approved, dismissing protests filed by the State of Alaska, and rejecting in part State selection application A-062964.

Affirmed as modified.

1. Alaska: Land Grants and Selections--Alaska National Interest Lands Conservation Act: Native Allotments--Alaska National Interest Lands Conservation Act: State Selections--Alaska Native Claims Settlement Act: Native Land Selections: State-Selected Lands

   A State of Alaska selection application which expressly states that it excludes prior claims does not select land described by a Native allotment application previously filed with the Bureau of Land Management, and therefore does not qualify under subsec. 905(a)(4) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(4) (1988), so as to preclude legis-lative approval of the allotment application under subsec. 905(a)(1), 43 U.S.C. § 1634(a)(1) (1988), and require adjudication under the Native Allotment Act.

APPEARANCES: Lance B. Nelson, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Mark Butterfield, Esq., Alaska Legal Services Corporation, for the heirs of Mary Elizabeth Gularte.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The State of Alaska has appealed two decisions of the Alaska State Office, Bureau of Land Management (BLM), dated October 26, 1988, finding that the Native allotment applications of Eliza (Mary Elizabeth) Gularte (A-062907), now deceased, and Emma A. Ronholdt (A-062882) were legisla-tively approved by section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988). In addition, BLM dismissed protests filed by the State and rejected in part State-selection application A-062964 as to the lands included in the allotments. Because the relevant facts concerning the allotment applications are similar, the

same State-selection application is at issue, and the appeals raise the same legal issues, they have been consolidated for review by the Board sua sponte. 1/

BLM determined that the Native allotment applications were legisla-tively approved under subsection 905(a)(1) of ANILCA which provides:

> Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) [the Native Allotment Act codified as amended at 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed 43 U.S.C. § 1617 (1988)] which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve--Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following December 2, 1980, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection * * *.

43 U.S.C. § 1634(a)(1) (1982). On appeal the State argues that para-graph (4) applies to preclude approval of the allotment applications. That subsection provides:

> [W]here an allotment application describes land which has been patented or deeded to the State of Alaska or which on or before December 18, 1971, was validly selected by or tentatively approved or confirmed to the State of Alaska pursuant to the Alaska Statehood Act * * * paragraph (1) of this subsection * * * shall not apply and the application shall be adjudicated pursuant to the Act of May 17, 1906, as amended, the Alaska Native Claims Settlement Act [P.L. 92-203, 85 Stat. 688, codified at 43 U.S.C. §§ 1601 through 1624 (1988)], and other applicable law.

43 U.S.C. § 1634(a)(4) (1988). The State contends that prior to December 18, 1971, it validly selected the land included in the allotment applications and, consequently, the applications must be adjudicated under the Native Allotment Act. The State requests the Board to reverse BLM's decision and remand the cases for a hearing.

The records before the Board, which include the case file for the State selection, show the State to be mistaken regarding the factual pre-mise of its argument. Those records show that Emma A. Ronholdt filed her Native allotment application on July 23, 1965, for the SE¼, sec. 33, T. 29 N., R. 5 W., Seward Meridian, Alaska, claiming that she had begun to occupy

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1/ The similarities of the cases are also reflected in the State of Alaska's statement of reasons and BLM's answer which present identical arguments in both cases. A brief on behalf of the heirs of Mary Elizabeth Gularte has been filed by Alaska Legal Services Corporation (ALSC).
Consideration of the appeals have been delayed by extensions granted counsel for all parties as the final brief was received Nov. 21, 1989.

the land as of the previous day. Five days later, Eliza Gularte filed her application for the NE¼ of sec. 28 of the same township, similarly claiming to have begun her occupancy as of the previous day. The State of Alaska filed its selection application with BLM on August 3, 1965. The selection application was for the entire township, but stated:

> It is the State's intent by this blanket filing to cover all available lands within the above area excluding any prior valid rights, cliams [sic] or patented lands. The State's filing is not intended to attach in cases where a valid entry is relin-quished and subsequently filed upon. All U.S. Surveys, if any, within protracted townships are included in [the] application.

[1] It is indisputable that Gularte's and Ronholdt's allotment applications were claims to land within the township. See Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985). As such, the State was required to exclude them by sub-section 6(b) of the Alaska Statehood Act which granted the State a right
to select 102,550 acres "from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of
their selection" and provided that "nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever." P.L. 85-508, 72 Stat. 339, 340 (1958), 48 U.S.C. § 21 (1988) (note prec.). Thus, by its terms and as required by the Statehood Act, the State's application was not intended to apply to the land claimed by Gularte and Ronholdt. It appears BLM reached the same conclusion in 1967 when, after directing the State to publish notice of its application, BLM tentatively approved the State's selection but excluded from the approval a list of "claims of record," including Gularte's and Ronholdt's allotment applications. 2/

Therefore, we find that the State did not select the land by its application filed with BLM on August 3, 1965. Nor does the record show that the State amended its application to select the land "on or before December 18, 1971," as provided by subsection 905(a)(4). Although the State filed a number of amendments to its selection application, the earliest was received by BLM on January 13, 1972, and stated simply that the State "reasserts and reaffirms its rights to acquire all open available lands within this township, including all lands which have heretofore been withdrawn and subsequently restored to [the] public domain." The first amendment which might be said to have encompassed the lands within the allotment applications was filed by the State on June 16, 1972. In that document the State amended its application to include all lands in the

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2/ In Elizabeth G. Cook, 90 IBLA 152 (1985), we addressed other allotment claims within the same township and State selection. In those cases, however, the allotment applications were filed after the State-selection application and the claims were not excluded from the July 11, 1967, tenta-tive approval. See also State of Alaska, 95 IBLA 196 (1987); State of Alaska, 85 IBLA 196 (1985).

township "excluding patented lands." 3/ That amendment, however, like the additional amendments filed January 2, February 1, October 23, 1979, and August 17, 1981, was subsequent to the statutory cut off of December 18, 1971.

Accordingly, we hold that the State of Alaska did not select the lands at issue on or before December 18, 1971, and that subsection 905(a)(4) does not apply to preclude legislative approval of the allotment applica-tions. State of Alaska, 109 IBLA 339, 345 (1989). We modify the decisions on appeal to the extent they may be construed to find that the State's original selection application included the lands in the Native allotment applications. BLM correctly rejected the State's selection application to the extent it included the allotment lands by virtue of the 1972 and sub-sequent amendments. See Dennis G. Quinn, 29 IBLA 307 (1977); Margaret L. Klatt, 23 IBLA 59 (1975). Because we find that the State did not select the land prior to December 18, 1971, we need not address the parties' argu-ments as to whether the State "validly selected" it as that term is used in subsection 905(a)(4).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

3/ Because the issue before us is only whether the State filed a selection on or before Dec. 18, 1971, we do not decide whether the June 16, 1972, amendment was an effective application for the lands. ALSC has argued that none of the State's selections have been effective because the land was segregated from selection under 43 CFR 2212.9-1(g) (1965) and subsequent codifications of the regulation. See 43 CFR 2561.1(e). Our holding in this case makes it unnecessary to resolve that issue.